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TO RUEHWH/WESTERN HEMISPHERIC AFFAIRS DIPL POSTS IMMEDIATE
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INFO RHEHNSC/NSC WASHDC PRIORITY
RUEAWJA/DEPT OF JUSTICE WASHDC PRIORITY

UNCLAS SECTION 01 OF 03 SANTO DOMINGO 000051

SENSITIVE
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DEPT FOR WHA DAS DROBINSON, WHA/CAR VDEPIRRO, BPREMONT

E.O. 12958: N/A
TAGS: [KJUS](#) [PGOV](#) [PHUM](#) [PREL](#) [DR](#)
SUBJECT: DR DEBATE OVER CONSTITUTIONAL REFORM OF JUDICIARY

REF: A. 2008 SDO 1608
[1](#)B. 2008 SDO 1819
[1](#)C. 2008 SDO 1959

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[1](#)1. (U) Summary: President Fernandez's proposed constitutional reforms continue to generate public comment, especially those reforms that touch on the judiciary. On "Judiciary Day" (07 Jan), Supreme Court President Subero Isa gave a speech underscoring the need for political leaders to respect judicial independence and strongly critiquing the proposed creation of a separate constitutional court and an administrative tribunal. A major rule-of-law NGO, FINJUS, doubts that the creation of a separate constitutional body would contribute to the "dismemberment" of the judiciary as Subero Isa claims. FINJUS notes, though, that much depends on whether the constitutional organ is more a chamber within the current Supreme Court structure, or a completely separate entity. Other crucial issues, raised at a 12 Jan forum hosted by the Foreign Ministry, include how members will be selected, their number, their term of office, and whether the constitutional body would review the constitutionality of laws and decrees before they are issued (as in France) or after (as in the United States) or both. In such technical details will rest the balance of power, if/when some reforms are made. End Summary.

Background

[1](#)2. (U) On September 18, 2008, President Leonel Fernandez presented sweeping constitutional reforms to the Dominican Congress (ref A). The reform process has not moved as swiftly as he apparently wanted, due in part to the intervening holidays and financial crisis, as well as some muscle-flexing by Congress. One of the key reforms proposed is the creation of a "sala constitucional." The term "sala" has led to confusion: as written, the proposal suggests a separate tribunal, but the word "sala" usually denotes a chamber within a court. This matter has become the subject of great debate.

President vs. President

[1](#)3. (SBU) President Fernandez's vague constitutional court idea has received push-back from the well-respected President of the Supreme Court, Jorge Subero Isa. As previously reported (ref B), Subero Isa has questioned the need for, efficacy and cost of, creating both a separate constitutional and an administrative tribunal. He also told Emboffs of his strong belief that, were a constitutional court to be created, its members must be professional judges and it must

not be able to overturn prior decisions of the Supreme Court, which currently hears constitutional and all other types of cases. He indicated to USAIDoffs that he would resign if the reforms were passed as written.

¶4. (U) Subero Isa's highly public Judiciary Day speech included two key themes: The need to avoid a separate constitutional court that might "dismember" and politicize the judiciary, and the need for commitment on the part of "political forces" to the concept of judicial independence. On this last point, he argued, "Nobody disputes that judicial independence is one of democracy's fundamental values (...) (yet) nowhere in the world does judicial independence exist if political forces do not, at some point, make (such) a commitment."

¶5. (U) He also indirectly responded to the uproar over the Supreme Court's recent Sun Land decision (ref C), by pointing to the ability of the United States to produce, and with time overcome, bad Supreme Court decisions. He cited specific decisions, including Dred Scott (regarding slavery) and Korematsu (regarding internment of Japanese-Americans), as examples of judicial errors later overruled or disavowed.

Other Voices -----

¶6. (U) The Vice President of FINJUS, an NGO supporting the rule of law that receives significant funds from USAID, disagreed with Subero Isa by saying that specialized constitutional courts function in "many countries" without "dismembering" the judiciary. At the same time, the FINJUS VP indicated that the government must clarify just what type of institution it is seeking to create - a chamber within the current Supreme Court or a separate tribunal. Even if a

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separate court is created, opined FINJUS, there would not necessarily be the "collision of trains" Subero Isa also said he fears.

¶7. (U) However, another important NGO, Participacion Ciudadana, agreed with Subero Isa's concern that two separate institutions would create conflict. Moreover, the concept of a "sala constitucional" as currently envisaged "does not correspond to an independent (judicial) organ," the NGO said.

¶8. (U) Just what might constitute an independent constitutional court was the theme of a discussion - at the Foreign Ministry's Diplomatic School on January 12 - by former French Senator, Constitutional Court member, Justice Minister, and law professor Robert Badinter. First, Badinter cogently set forth rationales for constitutional review, and the various forms (especially American and French) by which this can be done. Then, he explained that judges engaging in constitutional review must be protected by long (but not lifetime), un-renewable tenures. Citing the U.S. federal model, he said such judges must also be selected through a process involving both the legislative and executive branches to ensure that checks and balances exist. He implied, but did not clearly state, that members of a constitutional court should also be judges or otherwise have the needed expertise.

¶9. (U) While gently pleading for the French constitutional court model, he recognized that a main problem with its "a priori" review of constitutionality (i.e., before the legislation or decree is finalized) is that unforeseen constitutional issues may arise in the application of the law. Thus, Badinter is in favor of having both "a priori" constitutional review and "a posteriori" review - i.e., constitutional review arising from cases and controversies (as in the U.S.). He cited the European Court of Human Rights system as a model in this regard.

¶10. (U) With respect to a priori constitutional review, Badinter noted that French law allows any small group of

congressmen to seek constitutional review of draft legislation, not just France's President or the two leaders of the legislature's two chambers. In so doing, he raised an important detail, given the recent Sun Land decision by the Supreme Court, which indicated that only the Presidents of the Dominican Senate and Chamber of Deputies had standing to sue for violation of the constitution, in that case.

¶11. (SBU) Note: The timing of Badinter's invitation to speak at the Foreign Ministry's school for diplomats may not have been an accident - he clearly favors a European-style "constitutional court" - but he also suggested safeguards that Dominicans have perhaps not yet considered: advice and consent in the selection of constitutional court members, non-renewable tenure, good salaries, "before" and "after" constitutional review, and respect - by other branches of government - for the finality of constitutional decisions. End Note.

Comment

¶12. (SBU) The debate over the scope and form of constitutional reforms affecting the judiciary is heating up and Post is following the issue with great interest, given the importance of law enforcement issues here and the significant assistance that USAID has provided to the Dominican legal sector for the past 11 years. We are concerned that, on an issue of national importance such as this, Fernandez apparently failed to consult adequately with Subero Isa before submitting the proposed amendments. That concern is compounded by the fact that we have found the views of Subero Isa, as well as the head of Participacion Ciudadana, to be frequently on the mark in the past.

¶13. (SBU) Many details have yet to be worked out, but those details - regarding institutional structures, selection of judges, how constitutional review may be sought, etc. - will be crucial to the long-term effects of the constitutional changes.

¶14. (SBU) Finally, this debate takes place in the context, as Participacion Ciudadana puts it, of three "scandals" regarding judicial matters: The Sun Land decision, the questionable holiday bonuses for the new Court of Accounts (Camara de Cuentas), and the President's pardoning of persons found guilty in the Baninter and Renove fraud and corruption cases (ref C). With the respect, power and credibility of the judiciary already so much in play, it is to be hoped that

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Dominican political forces will take the concept of judicial independence and the details of judiciary-related constitutional reforms very seriously.

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